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10  
11 **UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**  
13 **SAN FRANCISCO DIVISION**

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15  
16 STALEY, *et al.*

17 Plaintiffs,

18 v.

19 GILEAD SCIENCES, INC., *et al.*

20 Defendants.

Case No. 3:19-cv-02573-EMC

**AMICUS CURIAE BRIEF OF THE  
FEDERAL TRADE COMMISSION**

Hearing: Jan. 16, 2020

Time: 9:00 a.m.

Courtroom: 5 – 17th Floor

Judge: Honorable Edward M. Chen

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**TABLE OF CONTENTS**

Interest of the FTC ..... 2

I. Market definition is a tool to analyze the particular anticompetitive effects alleged ..... 2

II. Defining different product markets to assess different theories of harm is neither  
“contradictory” nor legally deficient ..... 6

III. Conclusion ..... 11

**TABLE OF AUTHORITIES**

**Cases**

*Bell Atlantic Corp. v. Twombly*,  
550 U.S. 544 (2007)..... 1

*Brown Shoe Co. v. United States*,  
370 U.S. 294 (1962)..... 5

*Eastman Kodak Co. v. Image Tech. Servs., Inc.*,  
504 U.S. 451 (1992)..... 2

*FTC v. Indiana Fed’n of Dentists*,  
476 U.S. 447 (1986)..... 3, 4

*FTC v. Staples, Inc.*,  
970 F. Supp. 1066 (D.D.C. 1997)..... 5

*FTC v. Sysco Corp.*,  
113 F. Supp. 3d 1 (D.D.C. 2015)..... 5

*FTC v. Whole Foods Mkt., Inc.*,  
548 F.3d 1028 (D.C. Cir. 2008)..... 5

*Gen. Indus. Corp. v. Hartz Mountain Corp.*,  
810 F.2d 795 (8th Cir. 2004) ..... 4

*Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*,  
386 F.3d 485 (2d Cir. 2004)..... 3, 4, 10

*Gorlick Distrib. Ctrs., LLC v. Car Sound Exhaust Sys., Inc.*,  
723 F.3d 1019 (9th Cir. 2013) ..... 3

*Hicks v. PGA Tour, Inc.*,  
897 F.3d 1109 (9th Cir. 2018) ..... 10

*In re Aggrenox Antitrust Litig.*,  
199 F. Supp. 3d 668 (D. Conn. 2016)..... 9

*In re Impax Labs.*,  
Dkt. No. 9373 (Fed. Trade Comm’n June 7, 2019)..... 9

*In re Lorazepam & Clorazepate Antitrust Litig.*,  
467 F. Supp. 2d 74 (D.D.C. 2006)..... 10

*In re Nexium (Esomeprazole) Antitrust Litig.*,  
968 F. Supp. 2d 367 (D. Mass. 2013)..... 9

*In re Novartis AG & GlaxoSmithKline*,  
Dkt. No. C-4510 (Fed. Trade Comm’n Apr. 8, 2015) ..... 8

1 *In re Owens-Illinois, Inc.*,  
 115 F.T.C. 179 (Feb. 26, 1992) ..... 7

2 *In re Prestige Brand Holdings, Inc. & Insight Pharm. Corp.*,  
 3 Dkt. No. 4487 (Fed. Trade Comm’n Oct. 14, 2014)..... 8

4 *In re Sanofi-Synthelabo & Aventis*,  
 5 Dkt. No. C-4112 (Fed. Trade Comm’n Sept. 24, 2014) ..... 9

6 *Kaplan v. Burroughs Corp.*,  
 611 F.2d 286 (9th Cir. 1979) ..... 4

7 *Lucas Auto. Eng’g, Inc. v. Bridgestone/Firestone, Inc.*,  
 8 275 F.3d 762 (9th Cir. 2001) ..... 3

9 *NCAA v. Bd. of Regents of the Univ. of Okla.*,  
 468 U.S. 85 (1984)..... 2

10 *Newcal Indus., Inc. v. Ikon Office Sol.*,  
 11 513 F.3d 1038 (9th Cir. 2008) ..... 3

12 *Olin Corp. v. FTC*,  
 986 F.2d 1295 (9th Cir. 1993) ..... 5, 6

13 *Oltz v. St. Peter’s Cmty. Hosp.*,  
 14 861 F.2d 1440 (9th Cir. 1988) ..... 3, 4

15 *Pac. Coast Agr. Export Ass’n v. Sunkist Growers, Inc.*,  
 526 F.2d 1196 (9th Cir. 1975) ..... 5

16 *Reazin v. Blue Cross Blue Shield of Kan., Inc.*,  
 17 899 F.2d 951 (9th Cir. 1990) ..... 2

18 *Safeway Inc. v. Abbott Labs.*,  
 761 F. Supp. 2d 874 (N.D. Cal. 2011) ..... 3, 9

19 *Siegler v. Sorrento Therapeutics, Inc.*,  
 20 No. 3:18-cv-01681-GPC-NLS, 2019 WL 3532294 (S.D. Cal. Aug. 2, 2019)..... 10

21 *SmithKline Corp. v. Eli Lilly & Co.*,  
 22 575 F.2d 1056 (3d Cir. 1978)..... 9

23 *Spindler v. Johnson & Johnson Corp.*,  
 No. C 10–01414 JSW, 2011 WL 12557884 (N.D. Cal. Aug. 1, 2011) ..... 4

24 *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*,  
 25 778 F.3d 775 (9th Cir. 2015) ..... 3

26 *Theme Promotions, Inc. v. News Am. Mktg. FSI*,  
 546 F.3d 991 (9th Cir. 2008) ..... 3

27 *Thurman Indus., Inc. v. Pay ’N Pak Stores, Inc.*,  
 28 875 F.2d 1369 (9th Cir. 1989) ..... 3, 5

1 *U.S. Healthcare, Inc. v. Healthsource, Inc.*,  
 986 F.2d 589 (1st Cir. 1993)..... 1

2 *United Food & Commercial Workers Local 1776 & Participating Emp’rs Health &*  
 3 *Welfare Fund v. Teikoku Pharma USA (“Lidoderm”)*,  
 296 F. Supp. 3d 1142 (N.D. Cal. 2017) ..... 3, 9

4 *United States v. Continental Can Co.*,  
 5 378 U.S. 441 (1964)..... 7

6 *United States v. Grinnell Corp.*,  
 384 U.S. 563 (1966)..... 5

7 *United States v. Philadelphia Nat’l Bank*,  
 8 374 U.S. 321 (1963)..... 8

9 *United States v. Phillipsburg Nat’l Bank & Trust Co.*,  
 10 399 U.S. 350 (1970)..... 8

11 **Statutes**  
 12 15 U.S.C. §§ 41-58 ..... 2

13 **Other Authorities**  
 14 David Glasner & Sean P. Sullivan, *The Logic of Market Definition* 6 (Univ. Iowa Legal  
 Studies Research Paper No. 2018-14), ANTITRUST L.J. (forthcoming) ..... 4, 5

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 16 J. COMP. LAW & ECON. 619 (2010)..... 4

17 Phillip Areeda, *Market Definition and Horizontal Restraints*,  
 52 ANTITRUST L.J. 553 (1983) ..... 4

18 Richard A. Posner & Frank H. Easterbrook, *Antitrust: Cases, Economic Notes and*  
 19 *Other Materials* (2d ed. 1981) ..... 7

20 Steven C. Salop, *The First Principles Approach to Antitrust, Kodak, and Antitrust at the*  
 21 *Millennium*, 68 ANTITRUST L.J. 187 (2000)..... 4

22 U.S. Dep’t of Justice & Fed. Trade Comm’n,  
*Horizontal Merger Guidelines* (2010) ..... 3

23 **Treatises**  
 24 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (online edition) ..... 6

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1 In this case, the plaintiffs allege various forms of anticompetitive conduct by several  
2 manufacturers of branded HIV medications. The complaint alleges that this conduct harmed  
3 competition in two general ways: preventing competition from cheaper generic versions of each  
4 respective branded product; and reducing competition among branded products in a class of HIV  
5 therapies, leading to overall higher prices. Defendants have filed separate motions to dismiss.  
6 The Federal Trade Commission (FTC) submits this *amicus* brief to assist the Court's  
7 consideration of an important legal issue raised by Gilead's motion concerning relevant market  
8 definition in antitrust cases: whether there can be only one relevant market for a set of products,  
9 regardless of the alleged competitive harm. *See* Gilead's Mot. Dismiss 31-33, ECF No. 143. The  
10 FTC takes no position on the ultimate disposition of Gilead's motion or the sufficiency of the  
11 plaintiffs' factual allegations under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

12 As one court of appeals has observed, the key to understanding relevant market definition  
13 is "remembering to ask . . . what is the antitrust question in this case that market definition aims  
14 to answer?" *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 598 (1st Cir. 1993). Here,  
15 the corrected consolidated complaint alleges that "at least two types of markets are relevant" to  
16 answering the antitrust question in this case, because the challenged conduct "impair[ed]  
17 competition in multiple ways." Corrected Consolidated Compl. ¶¶ 376-77, ECF No. 118. Gilead,  
18 however, argues that alleging different product markets for different types of alleged harm is  
19 improper as a matter of law: "Such contradictory and vacillating market definitions" are "legally  
20 deficient under controlling law." ECF No. 143 at 5. It claims that "the pharmaceutical products at  
21 issue either are substitutable for one another, or they are not, and they cannot plausibly be both."  
22 ECF No. 143 at 32. Gilead thus appears to assert that there is only one relevant market,  
23 regardless of how its allegedly multi-faceted conduct may have impaired competition. ECF No.  
24 143 at 32.

25 This erroneous argument reflects two common misconceptions about market definition:  
26 first, that market definition is a freestanding inquiry separate from an examination of  
27 anticompetitive effects; second, and closely related, that there is always a single antitrust market  
28

1 for a given class of goods. In fact, market definition is merely an analytical tool to aid in  
2 assessing whether a challenged agreement or action has the potential for genuine anticompetitive  
3 effects. Antitrust law has long recognized the economic reality that competition exists in degrees,  
4 and that broader or narrower product markets may be appropriate depending on the action and  
5 associated effects being scrutinized. Thus, when multiple types of anticompetitive harm are  
6 alleged (as here), multiple markets may be relevant.

### 7 **Interest of the FTC**

8 The FTC's mission is protecting consumers and safeguarding vigorous competition in the  
9 marketplace. *See* 15 U.S.C. §§ 41-58. As an independent agency with over 100 years of  
10 experience enforcing the U.S. antitrust laws, the FTC has developed expertise investigating and  
11 litigating anticompetitive mergers and conduct cases. The FTC has primary responsibility for  
12 federal antitrust law enforcement across a wide range of industries, including the pharmaceutical  
13 industry.<sup>1</sup> The FTC has a strong interest in ensuring the proper application of legal and economic  
14 principles underlying the antitrust analysis of relevant market definition. Erroneous application  
15 of these principles may impede the FTC's law enforcement mission.

#### 16 **I. Market definition is a tool to analyze the particular anticompetitive effects alleged**

17 In antitrust cases, courts assess a defendant's market power to determine whether the  
18 alleged conduct has the ability to harm competition. Market power is "the ability to raise prices  
19 above those that would be charged in a competitive market." *NCAA v. Bd. of Regents of the*  
20 *Univ. of Okla.*, 468 U.S. 85, 109 n.38 (1984) (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*,  
21 466 U.S. 2, 27 n.46 (1984)).<sup>2</sup> Direct evidence that a firm has raised prices above the competitive  
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24 <sup>1</sup> For a summary of the FTC's antitrust actions in the pharmaceutical industry, *see* Overview of  
25 [https://www.ftc.gov/system/files/attachments/competition-policy-  
guidance/overview\\_pharma\\_june\\_2019.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview_pharma_june_2019.pdf).

26 <sup>2</sup> Claims of monopolization require proof of monopoly power, which the Supreme Court has  
27 described as "something greater than market power under §1 [of the Sherman Act]." *Eastman*  
28 *Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992). *See also* *Reazin v. Blue Cross*  
*Blue Shield of Kan., Inc.*, 899 F.2d 951, 967 (9th Cir. 1990) ("[M]onopoly power is commonly  
thought of as 'substantial market power.'" (citing 3 Phillip E. Areeda & Donald F. Turner,  
*Antitrust Law* ¶ 801 (1978))).

1 level can prove market power,<sup>3</sup> but typically courts assess market power indirectly by defining a  
 2 relevant antitrust market and then drawing inferences from the firm’s share of that market. *See,*  
 3 *e.g., Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1044 (9th Cir. 2008).

4 Market definition seeks “to identify the market participants and competitive pressures  
 5 that restrain an individual firm’s ability to raise prices or restrict output.” *Geneva Pharm. Tech.*  
 6 *Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004). This exercise involves more than  
 7 simply identifying functional substitutes—i.e., those products that can be used for the same  
 8 purpose. *United Food & Commercial Workers Local 1776 & Participating Emp’rs Health &*  
 9 *Welfare Fund v. Teikoku Pharma USA (“Lidoderm”)*, 296 F. Supp. 3d 1142, 1171-72 (N.D. Cal.  
 10 2017) (collecting cases). Instead, “a product market is typically defined to include the pool of  
 11 goods or services that qualify as *economic substitutes* because they enjoy reasonable  
 12 interchangeability of use and cross-elasticity of demand.” *Thurman Indus., Inc. v. Pay ’N Pak*  
 13 *Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989) (emphasis added) (citing *Oltz v. St. Peter’s*  
 14 *Cnty. Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988) and *Syufy Enters. v. Am. Multicinema, Inc.*,  
 15 793 F.2d 990, 994 (9th Cir. 1986)).<sup>4</sup> The “determination of what constitutes the relevant product  
 16 market hinges, therefore, on a determination of those products to which consumers will turn,  
 17 given reasonable variations in price.” *Lucas Auto. Eng’g, Inc. v. Bridgestone/Firestone, Inc.*, 275  
 18 F.3d 762, 767 (9th Cir. 2001).<sup>5</sup>

19  
 20 <sup>3</sup> *See, e.g., FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 460-61 (1986) (“[P]roof of actual  
 21 detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market  
 22 power.” (quoting 7 Phillip E. Areeda, *Antitrust Law* ¶ 1511 (1986)); *Oltz v. St. Peter’s Cnty.*  
 23 *Hosp.*, 861 F.2d 1440, 1448 (9th Cir. 1988) (same); *Safeway Inc. v. Abbott Labs.*, 761 F. Supp.  
 2d 874, 887 (N.D. Cal. 2011) (finding that plaintiffs created a triable issue of fact whether  
 Abbott had monopoly power in the market for boosted PI HIV drugs with sufficient evidence of  
 direct effects).

24 <sup>4</sup> The federal antitrust agencies and courts often use the “hypothetical monopolist” test to  
 25 determine which products are reasonably interchangeable with a product sold by a defendant and  
 26 should therefore be included in a relevant antitrust market. *See, e.g., St. Alphonsus Med. Ctr.-*  
*Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015); *Theme*  
*Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1002 (9th Cir. 2008); U.S. Dep’t of  
 Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* § 4.1 (2010).

27 <sup>5</sup> *See also Gorlick Distrib. Ctrs., LLC v. Car Sound Exhaust Sys., Inc.*, 723 F.3d 1019, 1025 (9th  
 28 Cir. 2013) (“[P]roducts must be reasonably interchangeable, such that there is cross-elasticity of  
 demand.” (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962))); *Spindler v.*  
*Johnson & Johnson Corp.*, No. C 10–01414 JSW, 2011 WL 12557884, at \*2 (N.D. Cal. Aug. 1,

1 Market definition, however, is not an end itself; “it merely aids in the search for  
 2 competitive injury.” *Oltz*, 861 F.2d at 1448. Antitrust law speaks of defining the “relevant”  
 3 market because market definition “provides the context against which to measure the competitive  
 4 effects of an agreement.” *Geneva Pharm.*, 386 F.3d at 496 (citing *Copperweld v. Indep. Tube*  
 5 *Corp.*, 467 U.S. 752, 768 (1984)). A firm without market power will not be able to harm  
 6 competition successfully, and market power thus “distinguishes the antitrust violation from the  
 7 ordinary business tort.” *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979).

8 Thus, as the Supreme Court has explained, the purpose of defining a relevant market “is  
 9 to determine whether an arrangement has the potential for genuine adverse effects on  
 10 competition.” *Indiana Fed’n of Dentists*, 476 U.S. at 460-61; *see also Gen. Indus. Corp. v. Hartz*  
 11 *Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 2004) (“It is initially important to keep in mind that  
 12 ‘[m]arket definition is not a jurisdictional prerequisite, or an issue having its own significance  
 13 under the statute; it is merely an aid for determining whether power exists.’” (quoting Lawrence  
 14 A. Sullivan, ANTITRUST 41 (1977)) (alteration in original)); Phillip Areeda, *Market Definition*  
 15 *and Horizontal Restraints*, 52 ANTITRUST L.J. 553, 553 (1983) (“In the law school classroom, I  
 16 am repeatedly disappointed that my students leap into market definition without first specifying  
 17 the particular legal question that the tribunal hopes to answer through market definition.”).  
 18 Antitrust economics likewise teaches that markets are defined with reference to alleged  
 19 anticompetitive effects at issue in the particular case.<sup>6</sup>

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21 2011) (“[P]roducts may be considered ‘reasonably interchangeable,’ where there is cross-  
 22 elasticity of demand, *i.e.* if customers would switch to alternatives in response to a price increase  
 23 in the alleged monopolist’s product.” (quoting *Rebel Oil, Co. v. Atlantic Richfield Co.*, 51 F.3d  
 1421, 1436 (9th Cir. 1995))).

24 <sup>6</sup> *See, e.g.,* Steven C. Salop, *The First Principles Approach to Antitrust, Kodak, and Antitrust at*  
 25 *the Millennium*, 68 ANTITRUST L.J. 187, 189 (2000) (“It is impossible to evaluate market power  
 26 accurately without understanding the conduct and effect claims at issue and analyzing market  
 27 power in the context of those claims.”); David Glasner & Sean P. Sullivan, *The Logic of Market*  
 28 *Definition* 6 (Univ. Iowa Legal Studies Research Paper No. 2018-14), [https://sean-p-sullivan.com/attachments/papers/2020\\_lmd.pdf](https://sean-p-sullivan.com/attachments/papers/2020_lmd.pdf), ANTITRUST L.J. (forthcoming) (“In antitrust,  
 markets are defined around specific theories of anticompetitive harm.”); Dennis W. Carlton,  
*Revising the Horizontal Merger Guidelines*, J. COMP. LAW & ECON. 619, 625-26 (2010)  
 (“Analyses of competitive effects and market definition/market concentration are complementary  
 and should not be viewed as substitutes.”).

1 Because antitrust markets are merely analytical devices to assess the alleged  
2 anticompetitive effects, they do not necessarily conform to intuition.<sup>7</sup> Indeed, some relevant  
3 markets that courts have recognized may appear counter-intuitive. *See, e.g., Pac. Coast Agr.*  
4 *Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1203 (9th Cir. 1975) (relevant market was  
5 “the distribution of oranges grown in Arizona and California for export to Hong Kong”); *FTC v.*  
6 *Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1039-42 (D.C. Cir. 2008) (relevant market was  
7 “premium natural and organic supermarkets”); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 48  
8 (D.D.C. 2015) (a relevant market was “broadline foodservice distribution to national  
9 customers”); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1080 (D.D.C. 1997) (relevant market was  
10 “the sale of consumable office supplies through office supply superstores”). Clearly, the products  
11 in these cases competed to some degree in broader spheres as well, but that fact did not preclude  
12 defining more narrow relevant antitrust markets when assessing the specific alleged  
13 anticompetitive effects at issue.

14 Indeed, the Supreme Court long ago explained that “within [a] broad market, well-  
15 defined submarkets may exist which, in themselves, constitute product markets for antitrust  
16 purposes.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).<sup>8</sup> As the Ninth Circuit  
17 observed in *Olin Corp. v. FTC*, “every market that encompasses less than all products is, in a  
18 sense, a submarket.” 986 F.2d 1295, 1299 (9th Cir. 1993). “Whatever term is used—market,  
19 submarket, relevant product market—the analysis is the same.” *Staples*, 970 F. Supp. at 1080  
20 n.11. In each case, the goal is to “recognize competition where, in fact, competition exists.”  
21 *Brown Shoe*, 370 U.S. at 326. Thus, there may be, for example “(1) a market for shoes generally  
22 in that a hypothetical cartel of all shoe manufacturers could raise prices substantially, and  
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24 \_\_\_\_\_  
25 <sup>7</sup> *See, e.g., Glasner & Sullivan, supra* note 6, at 6-7 (describing “the natural market fallacy” as  
26 one of three common misconceptions about relevant market definition, in addition to “the  
27 independent market fallacy” and “the single market fallacy”).

28 <sup>8</sup> *Brown Shoe’s* teachings apply in both merger and non-merger antitrust cases. *United States v.*  
*Grinnell Corp.*, 384 U.S. 563, 572-73 (1966) (“In § 2 cases under the Sherman Act, as in § 7  
cases under the Clayton Act . . . there may be submarkets that are separate economic entities.”  
(citing *Brown Shoe*, 370 U.S. at 325)); *Thurman Indus.*, 875 F.2d at 1375 n.1. (same (citing  
*Greyhound Comput. Corp. v. Int’l Bus. Machs. Corp.*, 559 F.2d 488, 494 n.1 (9th Cir. 1977))).

1 simultaneously (2) a market for HQMS [high-quality men’s shoes], in that a hypothetical cartel  
2 of its producers could raise its prices substantially.” Phillip E. Areeda & Herbert Hovenkamp,  
3 *Antitrust Law* ¶ 533 (online edition). Depending on the alleged anticompetitive effects, “each  
4 may be relevant to the consideration of some antitrust violation.” *Id.*

5 **II. Defining different product markets to assess different theories of harm is neither**  
6 **“contradictory” nor legally deficient**

7 Gilead attacks the relevant product markets alleged in the complaint on the ground that  
8 they are “contradictory” and that “the pharmaceutical products at issue either are substitutable  
9 for one another, or they are not, and they cannot plausibly be both.” Gilead’s Mot. Dismiss, ECF  
10 No. 143 at 33. But, as discussed above, it is simply not the case that only one relevant antitrust  
11 market is cognizable for any given product or set of products. To the contrary, across many  
12 different industries, courts have repeatedly recognized that multiple different relevant markets or  
13 submarkets may exist for a single class of products or services depending on the alleged  
14 anticompetitive harm.

15 Indeed, in *Olin Corp. v. FTC*, the Ninth Circuit expressly rejected an argument that  
16 recognizing multiple markets is inherently contradictory. 986 F.2d 1295, 1297 (9th Cir. 1993).  
17 *Olin* examined a pool sanitizer manufacturer’s purchase of a competitor’s assets. *Id.* at 1296. The  
18 parties produced two dry pool sanitizers (ISOS and CAL/HYPO). *Id.* They stipulated that there  
19 was a relevant product market limited only to ISOS sanitizers, but disagreed whether there was  
20 also a broader “dry sanitizers” market comprised of both ISOS and CAL/HYPO. *Id.* at 1297.  
21 Much like Gilead, *Olin* contended that “the existence of a relevant ISOS-only market precludes a  
22 broader dry sanitizers market” because “it is inconsistent to recognize a larger, dry sanitizers  
23 market once a relevant ISOS-only market has been identified.” *Id.* at 1301. The Ninth Circuit  
24 disagreed. It held that “[r]ecognizing ISOS as a submarket of the dry sanitizers market is not  
25 inherently contradictory with recognizing a dry sanitizers market” because “[w]ithin one market  
26 there may exist additional submarkets relevant for antitrust purposes.” *Id.* at 1299, 1301 (first  
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1 citing *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 274-77 (1964); and then citing *RSR*  
2 *Corp. v. FTC*, 602 F.2d 1317, 1320 (9th Cir. 1979)).

3 The Supreme Court’s decision in *United States v. Continental Can Co.*, 378 U.S. 441  
4 (1964), reflects the same principle. In that case, the Court found that glass and metal containers  
5 was the relevant product market in which to assess the merger of a metal can producer with a  
6 glass bottle manufacturer. *Id.* at 457. Applying the teachings of *Brown Shoe*, however, the Court  
7 noted that “a broader product market made up of metal, glass and other competing containers  
8 does not necessarily negative the existence of submarkets of cans, glass, plastic or cans and glass  
9 together.” *Id.* at 457-58 (citing *Brown Shoe*, 370 U.S. at 325). Indeed, as Judges Posner and  
10 Easterbrook later explained, “if the merger had been between two manufacturers of cans (or of  
11 bottles), the Court would surely have held that cans (or bottles) were an appropriate ‘submarket’  
12 in which to appraise the effects of the merger.”<sup>9</sup>

13 This prediction was borne out in the FTC’s subsequent decision in *In re Owens-Illinois,*  
14 *Inc.*, 115 F.T.C. 179 (Feb. 26, 1992). That case involved a merger of two leading glass  
15 manufactures (one of which had been involved in *Continental Can*).<sup>10</sup> The merging parties  
16 contended that the relevant product market consisted of “all rigid containers” (glass, plastic,  
17 metal, and paper). *Id.* at 294. The Commission disagreed, noting that “the [*Continental Can*]  
18 Court twice suggested that in evaluating the likely competitive effects of different combinations,  
19 narrower markets might be appropriate.” *Id.* at 302. Accordingly, the Commission found six  
20 submarkets for glass containers, defined by their end-use. *Id.* at 305-19 (concluding that glass  
21 containers for six end-uses—jams and jellies, mayonnaise, pickles, wine coolers, wine, and baby  
22 food and baby juice—constituted relevant product markets).

23 The Supreme Court has likewise recognized that there are potentially relevant product  
24 markets for both “clusters” of banking services and for the individual services that comprise  
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26 <sup>9</sup> Richard A. Posner & Frank H. Easterbrook, *Antitrust: Cases, Economic Notes and Other*  
27 *Materials* 366-67 (2d ed. 1981).

28 <sup>10</sup> After the Supreme Court held the *Continental Can* merger unlawful, Continental Can divested  
Hazel-Atlas’s plants to Brockway Glass Company, a respondent in *Owens-Illinois*.

1 those clusters. In *United States v. Philadelphia National Bank*, the Court held that the antitrust  
2 market was “commercial banking,” which it defined as a “cluster of products (various kinds of  
3 credit) and services (such as checking accounts and trust administration)” provided by large  
4 financial institutions. 374 U.S. 321, 356 (1963). The Court reached this conclusion even though  
5 it acknowledged that commercial banks competed to some degree with other institutions for  
6 some of the services within the cluster. *Id.* (“For example, commercial banks compete with  
7 small-loan companies in the personal loan market.”).

8         Seven years later, in *United States v. Phillipsburg National Bank & Trust Co.*, the  
9 Supreme Court again made clear that the existence of an overall cluster market for commercial  
10 banking services did not preclude the existence of other, narrower markets for the individualized  
11 financial services within that cluster. 399 U.S. 350, 360 (1970). The Court explained that  
12 “submarkets [for the individualized financial services] . . . would be clearly relevant, for  
13 example, in analyzing the effect on competition of a merger between a commercial bank and  
14 another type of financial institution,” but were “not a basis for the disregard of a broader line of  
15 commerce that has economic significance.” *Id.* (citing *Brown Shoe*, 370 U.S. at 326). In other  
16 words, the smaller financial markets identified by the district court may have been relevant  
17 markets for analyzing different conduct involving different alleged competitive effects, but were  
18 not relevant to the alleged harm at issue.

19         Courts have also recognized the possibility of co-existing broad and narrow relevant  
20 markets for pharmaceuticals. For example, the relevant market might consist of an entire  
21 therapeutic class of drugs when the anticompetitive effects are likely to manifest among that  
22 entire class, such as in a merger between two branded manufacturers. *See, e.g., In re Novartis AG*  
23 *& GlaxoSmithKline*, Dkt. No. C-4510 (Fed. Trade Comm’n Apr. 8, 2015) (Novartis’s proposed  
24 acquisition of GlaxoSmithKline’s cancer portfolio required divestiture of Novartis’s  
25 development-stage BRAF and MEK inhibitor drugs); *In re Prestige Brand Holdings, Inc. &*  
26 *Insight Pharm. Corp.*, Dkt. No. 4487 (Fed. Trade Comm’n Oct. 14, 2014) (proposed merger  
27 required maker of Dramamine to divest Bonine to preserve competition in over-the-counter  
28

1 motion sickness drugs); *In re Sanofi-Synthelabo & Aventis*, Dkt. No. C-4112 (Fed. Trade  
2 Comm’n Sept. 24, 2014) (proposed merger required divestiture of Arixtra because consolidation  
3 with Lovenox would have reduced competition in the relevant market of Factor Xa inhibitors).

4 In other circumstances, the relevant market might be limited to only a subset of a  
5 therapeutic class. In *Safeway Inc. v. Abbott Laboratories*, plaintiffs alleged monopolization of the  
6 market for “boosted protease inhibitors (PIs) used to treat HIV.” 761 F. Supp. 2d 874, 884-85  
7 (N.D. Cal. 2011). Defendants argued that this market definition was overly narrow, because  
8 another class of HIV therapies—non-nucleoside reverse transcriptase inhibitors (NNRTIs)—are  
9 functionally comparable to boosted PIs. *Id.* at 888. The court held that “this similarity does not  
10 preclude Plaintiffs’ definition of the boosted market for antitrust purposes,” noting that the  
11 availability of “several HIV therapies, including NNRTIs and boosted PIs . . . is not inconsistent  
12 with Plaintiffs’ definition of a boosted PI submarket that exists within a broader HIV therapy  
13 market.” *Id.* Similarly, in *SmithKline Corp. v. Eli Lilly & Co.*, the Third Circuit acknowledged “a  
14 certain degree of interchangeability among all antibiotics,” but limited the relevant market to  
15 cephalosporin antibiotics because they were sufficiently differentiated from other antibiotics  
16 such that Lilly’s conduct to maintain dominance over them could have anticompetitive effects.  
17 575 F.2d 1056, 1064-65 (3d Cir. 1978).

18 Where anticompetitive effects are alleged to result from conduct excluding lower-cost  
19 generic versions of a given drug, the relevant market is frequently even more limited, consisting  
20 of only the brand and generic versions of that product. *See, e.g., Lidoderm*, 296 F. Supp. 3d.  
21 at 1176 (defining a market for 5% lidocaine patches, i.e., Lidoderm and its generic equivalents);  
22 *In re Aggrenox Antitrust Litig.*, 199 F. Supp. 3d 668, 668 (D. Conn. 2016) (“The existence of a  
23 broader market that imposed some price constraints on Aggrenox—but without approximating  
24 the more competitive market that developed after generic entry—has no bearing on any issue in  
25 this case.”); *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 389 (D. Mass.  
26 2013) (concluding that the relevant market consisted of the brand and generic alone); *In re Impax  
27 Labs.*, Dkt. No. 9373 (Fed. Trade Comm’n June 7, 2019) at 26 (defining the relevant antitrust  
28

1 product market as branded and generic oxymorphone ER, noting “in most cases arising in the  
2 [pharmaceutical reverse payment] context, a brand and its generics will constitute the relevant  
3 market”).

4         Indeed, even a product market limited to generic versions of a particular branded drug  
5 may be a relevant market in which to analyze alleged anticompetitive effects. In *Geneva Pharm.*  
6 *Tech. Corp. v. Barr Labs.*, a manufacturer of a generic warfarin sodium product alleged that  
7 Barr, the manufacturer of another warfarin sodium generic had locked up a critical source of  
8 supply and thereby excluded it from the market. 386 F.3d at 485. The Second Circuit found that  
9 “once Barr entered the market, the market became segmented so that Coumadin [the brand-name  
10 warfarin sodium product] and Barr each had smaller, distinct customer groups,” and that Barr  
11 could charge higher prices for its generic product if it excluded its generic competitor. *Id.* at 500.  
12 Thus, the relevant market was appropriately limited to generic warfarin sodium, excluding the  
13 branded version of the same product. *Id.*; see also *In re Lorazepam & Clorazepate Antitrust*  
14 *Litig.*, 467 F. Supp. 2d 74, 82 (D.D.C. 2006) (relevant antitrust market was generic Lorazepam  
15 and Clorazepate tablets).

16         As these cases demonstrate, the relevant product market may vary considerably,  
17 depending on the alleged anticompetitive effects at issue. And if there are multiple theories of  
18 harm in the same case, as here, the case may implicate multiple relevant markets. In such cases,  
19 the court’s task is to assess each alleged market on its merits. The two cases Gilead relies upon in  
20 its motion to dismiss are not to the contrary. Neither *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109 (9th  
21 Cir. 2018), nor *Siegler v. Sorrento Therapeutics, Inc.*, No. 3:18-cv-01681-GPC-NLS, 2019 WL  
22 3532294 (S.D. Cal. Aug. 2, 2019), dismissed antitrust claims merely because plaintiffs alleged  
23 multiple product markets. Rather, in both instances, the court found that plaintiffs failed to plead  
24 sufficient facts to support any of their alleged relevant markets.<sup>11</sup> Antitrust plaintiffs frequently

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26 <sup>11</sup> *Hicks*, 897 F.3d at 1121-23 (holding that golf caddies did not allege facts that would make it  
27 plausible to find that “in-play” advertising was not “reasonably interchangeable” with other  
28 methods of advertising to golf fans); *Siegler*, 2019 WL 3532294, at \*15-16 (holding that plaintiff  
failed to offer any allegations regarding reasonable interchangeability for either of her two  
proposed markets, and admitted that one of her proposed product markets did not exist).

1 plead broad relevant markets and narrower relevant markets within, and courts assess each  
2 alleged relevant market individually to analyze the corresponding alleged anticompetitive  
3 effects. Such pleading is not inherently contradictory. The linchpin for market definition is  
4 properly defining a market in which alleged anticompetitive effects can be assessed. Gilead cites  
5 no case that holds as a matter of law that there can never be more than one well-pleaded product  
6 market relevant to assessing all the alleged anticompetitive harm.

7 **III. Conclusion**

8 The FTC takes no position on whether the complaint contains sufficient facts supporting  
9 the alleged product markets in this case to satisfy the plausibility standard applicable at the  
10 motion to dismiss stage. But an argument that alleging multiple relevant markets is  
11 impermissible as a matter of law is, the FTC submits, contrary to both the underlying purpose of  
12 market definition and the weight of case law.

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Respectfully submitted,

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